UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DAVID GANEK,

Plaintiff,

v. 15 CV. 1446 (WHP)

DAVID LEIBOWITZ, et al.,

Defendants.

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New York, N.Y.
November 20, 2015
10:30 a.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

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(Case called)

THE COURT: Good morning to all of you. This is oral argument on the defendant's motion to dismiss.

Do you want to be heard, Mr. Krause?

MR. KRAUSE: Yes, your Honor. Thank you.

Your Honor, plaintiff's complaint should be dismissed in its entirety for multiple reasons. The complaint contains grandiose allegations of conspiracy to improperly target plaintiff, but those claims do not withstand scrutiny.

First the complaint was filed long after the statute of limitations expired here.

Second, the plaintiff does not plausibly allege that the search warrant affidavit contained a misstatement of any sort, and that failure defeats both plaintiff's Fourth Amendment claim and his Fifth Amendment claim.

Third the alleged false statement was not even necessary for a finding of probable cause to search plaintiff's office and his personal effects in light of the other information contained in the search warrant affidavit.

Additionally, the Fifth Amendment claim independently fails because plaintiff has not alleged he was deprived of liberty or property without due process.

Finally, there's no basis in the complaint to plausibly refer to the personal involvement of any of the supervisors of defendants in any of the alleged wrongdoing.

We'll start with the statute of limitations argument, Your Honor. The plaintiff's claims accrued on the date that the search warrant was executed, November 22, 2015.

The recent Second Circuit precedent has shown that in search warrant cases -- or I should say in cases alleging unconstitutional searches -- the harm from that unconstitutional search occurs as a result of the search itself. Plaintiff certainly knew here that the search was conducted on that day.

But, even applying the diligence discovery rule of approval that plaintiff advocates for, the claims certainly accrued within a short time after the search, if not on the day of the search itself.

The plaintiff was well aware of the basic facts regarding his alleged injury and didn't pursue a diligence investigation of his claim.

It's not necessary under the diligence discovery rule to have every relevant fact. A claim will accrue when a plaintiff knows or should know enough facts to protect himself by seeking counsel, seeking advice of counsel, so that counsel can then have time to investigate and determine whether or not to bring the suit.

THE COURT: Are you suggesting that the criminal division of your office would have been open to unsealing the warrant application for Mr. Ganek's benefit during it's ongoing

investigation?

MR. KRAUSE: I'm not sure the answer to that, your Honor. It's certainly possible that it might have been at some point in time -- I'm not sure when that might have been -- or there might have been some way to have a limited disclosure or disclosure in redacted form as to relevant portions. We don't know. That's something that we don't have the opportunity to know because it was never sought.

THE COURT: That's remarkable. You know, cases speak of claims accruing when plaintiffs are able to discover their claim with an exercise of reasonable diligence.

I take it that the government acknowledges that Bivens claims are subject to equitable tolling.

MR. KRAUSE: Yes, your Honor. That they may be subject to equitable tolling. Yes.

THE COURT: So how did the statute of limitations begin to run on the day of the search when Mr. Ganek would have no idea that there were material misrepresentations in the search warrant application?

MR. KRAUSE: Well, your Honor, there is the Northern District case in Triestman that does say that even if the search warrant affidavit is under seal, the statute of limitations can run.

THE COURT: That case I know you rely on, but it really is an outlier, isn't it? It's a one-page decision by

then Judge Pooler accepting and adopting the report and recommendation of a magistrate.

MR. KRAUSE: That is all true, your Honor.

THE COURT: By the way, not that I'm faulting you because it's not reported on Westlaw, but if you were to look at the docket sheet for Triestman, you would find out and learn that the case was actually reversed by the Second Circuit. The specific reasons are unclear on the docket sheet.

Because it's so long ago, it's not available to me on ECF. I'm not faulting you because you should be able to rely on Westlaw. But the case was vacated and remanded by the Second Circuit.

MR. KRAUSE: Okay, your Honor. We were not aware of that.

THE COURT: In any event, I'm not bound by that case.

MR. KRAUSE: Certainly.

THE COURT: So do you have some other authority for this proposition?

MR. KRAUSE: That's the only authority, your Honor, that we located for the comparable facts where a search warrant affidavit had been under seal.

THE COURT: Once again, just think about the logic of it. A search warrant is obtained. The place and person to be searched have no idea why they're subject to the search warrant, and you make the argument that after the affidavit in

support of the warrant was disclosed, that then Ganek should have filed a lawsuit. Right?

MR. KRAUSE: Well, certainly that he had ample time to do so, your Honor.

THE COURT: How would he know, looking at the affidavit, that there was a falsehood, a material falsehood, in the affidavit?

MR. KRAUSE: Of course, we take issue, but it certainly would require further investigation based on the review of the search warrant. That is an investigation he certainly could have undertaken.

THE COURT: You point out that Ganek would have had 20 months to bring suit following the trial testimony that put him on notice of his claim; right?

MR. KRAUSE: No. If we said that, that's not exactly right, your Honor. It depends when, of course, you count the date of accrual.

Even if you count the date of accrual from the date of the search, the trial testimony was in December 2012. So, if that was the date of accrual, he would have had about a year, a little less than a year. Twenty months would have been from the day that he alleges in the complaint that he received a copy of the search warrant.

THE COURT: Even at trial -- when you make the argument, whether it's 20 months when he received the affidavit

or less than 20 months when the trial testimony came to light, aren't you essentially asking the Court to turn a statute of limitations with equitable tolling into a strict statute of repose that runs from the search under all circumstances?

MR. KRAUSE: Well, your Honor, we think that even if the discovery-based rule of accrual were to apply, a proper accrual date still would have been within a short time after the search was executed.

To allude back to your Honor's initial question, because Mr. Ganek could have at least sought the unsealing of the search warrant affidavit, which there's no indication that he did --

THE COURT: Haven't other circuits said that not only do you have to know about the search, but you have to know about the facts that make it unlawful?

MR. KRAUSE: Well, I think, at the end of the day, those cases do not necessarily stand for the proposition that you need to know that there is potential liability.

The cases do refer to needing to know about the cause -- here the cause, what prompted the search, was the warrant itself. The contents of the warrant underlie that. The warrant itself was the immediate cause of the search.

If Mr. Ganek had sought to investigate further the warrant, he might have then been able to continue his investigation and discover what he believes to be a more

particularized issue here.

THE COURT: Do you want to move on to other arguments.

MR. KRAUSE: Sure. I'll turn to the Fourth Amendment argument first. For a plaintiff seeking to challenge the approval of a search warrant on the grounds that there was a misrepresentation in the search warrant application, the plaintiff must make a showing of a knowing, intentional, or reckless false statement, and that false statement must be necessary to the finding of probable cause.

The complaint here, your Honor, fails on both accounts. The alleged misstatement that's identified in the complaint is based on an erroneous reading of the plain language of the search warrant application itself.

The complaint focuses on the allegation that the cooperator, who is referred to in the search warrant, Mr. Adondakis, never told Mr. Ganek the sources of his inside information about a particular public company, Dell, Incorporated.

He provides trial testimony from the trial of his cofounder at Level Global, Anthony Chiasson, indicating that Mr. Adondakis testified that he never told Mr. Ganek about the sources of his inside information about Dell.

But the relevant portions of the search warrant affidavit don't refer to Dell specifically. Instead they use the term "inside information," a defined term in the warrant

affidavit, which is defined as material, nonpublic information about public companies, not specific to Dell.

In fact, the warrant throughout refers to a number of different public companies, which makes sense given that it was a warrant that came at the early stages of the investigation into potential insider trading violations.

As pointed out in the complaint, the warrant was issued and executed in November 2010. Mr. Chiasson wasn't even charged for some time thereafter indicating that the investigation was ongoing throughout that time.

THE COURT: Doesn't the complaint allege that Adondakis specifically told the defendants he could not implicate Ganek in any insider trading?

MR. KRAUSE: The way that we read the complaint, your Honor, that those allegations pertain to Dell. That comes from the trial testimony. The context of that trial testimony is speaking about Dell in particular.

THE COURT: Doesn't this Court, for the purposes of this motion, have to expect the allegations as pleaded?

MR. KRAUSE: Well, certainly to the extent those allegations give rise to a liable inference of a claim. Again, if you look at that trial testimony, that testimony is specifically about Dell and the source of inside information from Dell. I do not believe that it's plausible to take that and extrapolate into a broader allegation that's not the core

of the complaint.

THE COURT: Why not? Why isn't that plausible at the pleading stage, Mr. Krause?

MR. KRAUSE: Your Honor, the trial testimony, at that point, after the investigation was complete, two years when the case proceeded to trial, there was certainly a focus on Dell and one other stock that had been under investigation.

But, at the time of the search warrant application, as indicated in the application, there were a number of different avenues being pursued, a number of potential different sources of inside information, a number of different publicly traded companies at issue.

So, when the search warrant affidavit uses the term "inside information," it uses that as a term as set forth in the affidavit. When referring to specific public companies, it does so by name.

Had the purpose of that statement in the search warrant affidavit been to indicate that Mr. Ganek had received inside information about Dell in particular, I think we would have a different position on that issue.

Because it's a reference to inside information, which links to the broader investigation, I don't believe it's a plausible inference to say the testimony about the one stock, Dell, can be understood to essentially mean the same thing as the broader defined term of "inside information."

THE COURT: Ganek alleges that the government secured a source warrant based on fabricated evidence, that you decided to use a raid instead of a subpoena, and that it alerted "The Wall Street Journal" of the raid for no other purpose than to inflict damage on Ganek and its business and to drum up publicity for the investigation. Those are his allegations.

Is it the government's position that if those allegations were true they would not violate the Fourth Amendment's restriction on unreasonable searches or seizures?

MR. KRAUSE: Well, with respect to the fabrication, I've noted the first argument that we have with respect to the fabrication, which is that that's not a plausible inference to draw based on the language of the affidavit.

We also have the argument based on the corrected affidavit analysis which I can turn to. I'll try to take those in pieces, your Honor, if I may.

THE COURT: You may.

MR. KRAUSE: If an alleged misstatement is not required, then there is no Fourth Amendment violation. Here, based on the remaining information, even if your Honor were to go through the corrected affidavit analysis and excise from the search warrant application the one particular allegation that Mr. Ganek allegations is a misstatement, there is probable cause to search his office in Texas even without that statement.

The search warrant affidavit contains a number of additional statements and allegations which are not being challenged here specifically.

THE COURT: Under the corrected affidavit analysis, wouldn't you not only have to excise the false information but put in the correct information, namely, as Ganek alleges in his complaint, that Adondakis never shared any inside information with him?

MR. KRAUSE: It is true. You do need to supply the allegedly omitted information. Your Honor, even if that statement were added to the search warrant affidavit, there is probable cause to search Mr. Ganek's office and devices, not necessarily because he is a culpable participant in the alleged criminal activities, but because other people with whom he worked closely were and because Mr. Ganek received that inside information, which is stated in the affidavit and acknowledged in the complaint.

The trade is based on that information. The complaint takes the position that he did not know -- he was not knowingly participating in the insider trading because he did not know the source of that information.

There's no allegation that he didn't have the information or that he didn't trade on the information.

THE COURT: Wouldn't ultimately that be an issue for a finder of fact under the Velardi decision?

MR. KRAUSE: Your Honor, we think the facts and circumstances of this case are such that it is possible to make a determination with respect to the corrected affidavit analysis on the face of the warrant and the application itself.

In Escalera and the succeeding line of cases following Escalera, the determination is to consider, from a qualified immunity standpoint, whether a reasonable officer had an objective basis to believe that there would be probable cause even with a corrected affidavit analysis.

Admittedly the circuit case law on this is complicated. There are different strains of interpretation that a corrected affidavit analysis, the Escalera line of cases being a more recent line of cases than the Velardi line of cases.

Following that line of cases, we certainly think that based on the facts and circumstances of this particular case, given what is and what is not be challenged in the search warrant affidavit, that a ruling on our motion to dismiss is possible.

To just go back to your Honor's broader question about the various different aspects of the potential Fourth Amendment violation, the decision to use a search warrant as opposed to a subpoena in this case which plaintiff alleges is in and of itself unreasonable and a violation of the Fourth Amendment, there is no requirement that the government demonstrate that a

subpoena would not be sufficient as a method of collecting documents when there is probable cause to search a particular location.

If there is probable cause, then a search warrant is an absolutely appropriate tool to use as part of an investigation.

Not only is there no clearly established law to the contrary, but it's quite clear from Zurcher on down that the government need not rule out the possibility of using a subpoena in order to be allowed to use a search warrant.

The affidavit states -- again, there's no allegation in the complaint that this is part of the purported misstatement.

The affidavit states a basis for searching the various locations at the offices because of a concern about loss of evidence as set forth in the affidavit itself. There's no allegation that that is a misstatement in any way.

As to the alleged ticking of the news media, as a threshold matter, that allegation fails to allege a personal allegation of a particular defendant. There's no allegation that any one person was responsible in sort of a leading allegation which is insufficient on its face.

But beyond that, the question comes down to a balancing of privacy interests and legitimate law enforcement interests. Here there's no indication of the media intrusion

into Mr. Ganek's office or into the office of Level Global itself or of the building, let alone into his home where there are a series of cases where media intrusion into a home has been found to be problematic with respect to the Fourth Amendment.

There's no indication here that Mr. Ganek himself was photographed or recorded in any way. So the privacy interests, if any, are miniscule here. The law enforcement interests, which plaintiff takes issue with, as to notifying the public of efforts to combat crime, facilitating accurate reporting, deterrence, transparency -- these are interests that have been discussed in various different contexts and have been found to be legitimate law enforcement interests in certain contexts and not legitimate law enforcement interests in other contexts.

But the context in which those claim to be not legitimate law enforcement interests have been situations where the privacy interest has vastly outweighed those potential law enforcement interests, which the courts have rejected.

But, in any event, your Honor, the analysis here is also there's no clearly established law that this type of ticking, even if it did occur, would constitute a Fourth Amendment violation.

There's no controlling case law along these lines. The cases that actually both sides cite in their papers and interpret differently, but the cases don't point to anything

remotely comparable.

This is not like Wilson or Ayeni where you have the media invited along to participate in an intrusion into somebody's home where those camera crews and reporters were photographing individuals in their homes, their private spaces.

It's not the staged perp walk case where in fact, a prisoner had been transported from one location to another in the traditional way that we sometimes see on the news media, but the media wasn't there for that.

So they invited the media back and did the walk again, which clearly at that point that served no legitimate law enforcement interest because the legitimate law enforcement interest of transporting the individual from one place to another had already been accomplished, and the entire charade was staged for the media at that point. That's not what happened here.

So we believe the Fourth Amendment allegations with respect to the manner and scope of the search as to the good use of the warrant or the subpoena or the alleged ticking of the news media are not sufficient to support a Fourth Amendment violation.

THE COURT: If an individual is subject to such a search as alleged in the complaint, is it the government's position that there is no duty to limit collateral damage of that search if the individual is not reasonably suspected of

criminal behavior?

MR. KRAUSE: I don't think that that argument is -- no, your Honor. We're not suggesting that. At the same time, the law enforcement interest of searching for evidence of a crime is a critical interest and cannot be set aside. Certainly those potential collateral consequences, as your Honor referred to, very likely would be.

In fact, the allegation here is that those consequences were considered. So there's no allegation in the complaint before us that there was no consideration given to potential -- again, to use your Honor's phrase, collateral consequences in this particular search.

THE COURT: Let's say that after meeting with Ganek's attorney, the U.S. Attorney's Office determined that there were material omissions and misrepresentations in the search warrant affidavit.

What, if anything, would the U.S. Attorney's Office be legally obligated to do?

MR. KRAUSE: In terms of a legal obligation, I'm not entirely sure. I think, as a practical matter, what very well might happen is there would be an effort to correct that because we're dealing with a situation where that is coming to light ex post. The search has already happened. It's not a situation where it's been discovered --

THE COURT: It's this case. It's the allegations in

this case, not in another case. It's ex post.

MR. KRAUSE: Your Honor, under those circumstances, I could envision a scenario where the office would go back to the magistrate judge with a corrected affidavit and seek to determine whether or not the search in fact would have been appropriate in light of a corrected affidavit, much the same analysis that the Court would have to go through in this case based on the corrected affidavit analysis.

THE COURT: But even in that situation, it's months after the affidavit has been received by the magistrate judge, the warrant has been issued, and it's been executed, and it's still all under seal.

And, presumably in the hypothetical that we're discussing, the government would then be coming back to that magistrate with something, once again, under seal.

MR. KRAUSE: Presumably, right. I think that's right, your Honor.

THE COURT: What does that do for Mr. Ganek?

MR. KRAUSE: I understand that question, your Honor. I think what Mr. Ganek was seeking at that point in time was some sort of statement from someone in the office that he was not a target of the search.

There was no probable cause to believe that -- I'm sorry. Not that he was not a target of the search. There was no probable cause to believe that he had committed any sort of

insider trading violation.

Your Honor, those discussions were happening at a very preliminary stage of this investigation. So even had there been some determination made that it was a misstatement or an omission in the search warrant, I don't see that there's any way Mr. Ganek would have been given the assurance that he sought at that point.

Again, even if that determination had been made, there's no telling that that determination would have been necessarily led to that consequence that he was seeking, which was to have some sort of public name clearing or exoneration or whatever exactly it was and he had hoped to obtain.

I don't think there's any basis for that to be offered at that point in time or any point in time in this case. So it's a difficult question because it's a hypothetical that I'm not sure exactly what would have happened in terms of what the office would have attempted to do to address a misrepresentation that it became aware of. I'm sure there would have been something.

With respect to this case and the relief or the outcome that Mr. Ganek sought, even had that information been uncovered through subsequent discussions, the relief he sought would not have necessarily been forthcoming.

THE COURT: All right. Anything else?

MR. KRAUSE: Your Honor, I would touch upon the Fifth

Amendment arguments.

THE COURT: You can discuss them briefly.

The parties didn't address the Second Circuit's Turkmen decision in their briefs. I'm going to ask both sides to give me a simultaneous letter submission on the import of Turkmen where the Second Circuit revived a Bivens claim against the Attorney General and the director of the FBI finding that the complaint plausibly pled that they were aware of allegedly unconstitutional post 9/11 detention policies and practices.

So on the question of supervisory liability or the duty to intercede, I'm going to ask both sides to submit a letter on that.

MR. KRAUSE: Okay. I would thank you, your Honor for that opportunity to do that.

Just to very briefly address that point, in Turkmen, there's a lot of factual material that the circuit relied on in determining that those high-level supervisors were aware of or should have been aware of the alleged constitutional violations.

We think that that's quite distinguishable from the facts here. We'll certainly address that.

THE COURT: Thank you.

MR. KRAUSE: Again. Thank you for the opportunity to do that, your Honor.

On the Fifth Amendment, as I'm sure your Honor has

seen, the parties have gone past each other a little bit on the proper way to organize the claims.

From our perspective, your Honor, as we set forth in our brief, the Fifth Amendment claim is entirely disposed of by the Fourth Amendment claim because the Fourth Amendment claim fails for the reasons we've outlined in our brief and what we've discussed today.

Either one of those would be a complete disposition of the Fifth Amendment claim as well. But, even if the Fourth Amendment claim were to survive, the Fifth Amendment claim independently should fail because there's an absence of allegation that Mr. Ganek was deprived of liberty or property without due process.

As to liberty, the only liberty allegation that's discernible from the complaint, Mr. Ganek was never arrested. He was never imprisoned for any length of time.

So the only liberty issue is a stigma plus claim based on a defamatory statement leading to allegedly a state-imposed additional burden.

But Mr. Ganek doesn't allege a stigma plus claim here on either prong of the stigma plus test. There's no defamatory public statement.

The news articles that are cited in the complaint don't mention Mr. Ganek. The news articles -- one of them may have mentioned Mr. Ganek but not as part of the statement

uttered by any government official, let alone any of the defendants.

My recollection is the only statement from a government official is a spokesperson that says that search warrants were being executed. In fact, that's a true statement. So that can't be the basis of a stigma plus claim either.

To the extent the allegation is the alleged misstatement in the warrant affidavit is the stigmatizing statement, that statement was not public and was never made public.

In fact, it was only made public here pursuant to motion filed by the New York Times, and the government was prepared to submit a redacted version.

And, in fact, the version that is public is a redacted version, redacted for privacy interests for a number of individuals and companies who were never charged with any misconduct.

Mr. Ganek's name would have been redacted from that as well had his counsel actually not told us that he wanted his name to be included, again, presumably to facilitate this lawsuit not under seal. We understand the reasons.

It's not possible for that to be a public defamatory statement or even a defamatory statement that was likely to be made public for purposes of a stigma plus claim.

To the extent the argument in favor of a stigmatizing public statement is meant to be the actions of the government, the fact that a search warrant was executed, the alleged ticking of the media, and any inferences drawn from those actions, that can't be the basis for a stigma claim either.

The O'Connor case from the Second Circuit have discussed that allegations that actions by a government entity as part of the stigma plus claim and rejects that possibility.

So, even if the stigma plus claim fails for the simple reason there's no defamatory public statement at all -- and on top of that, there's no additional state-imposed burden that would satisfy the plus element.

The deleterious effects flowing from the damaged reputation -- it's quite clear that that it is not a plus element for purposes of the stigma plus analysis.

That's the Sadallah case. To the extent the allegation here is that the business closed several months later as a result of the execution of the search warrant, the allegations in the complaint talk about the business failing after investors learned of the investigation and the execution of the search warrant withdrew their funds, which is a quintessential example of harm or alleged harm based on reputational damages.

Your Honor, I'm happy to defer discussion of the failure to proceed in supervisory liability in light of

your Honor's comment and to address that further in a subsequent briefing.

THE COURT: What's, in your view, the difference between supervisory liability and failure to intercede in this case?

MR. KRAUSE: Your Honor, we actually have been struggling to understand that as well in light of the position taken in plaintiff's opposition brief that they don't seem to be contesting our argument in our opening brief that there's no allegation of grossly negligent supervision or anything like that.

The argument in opposition is essentially that both of the supervisors here were personally involved in the conduct. If that's the case, it's not really supervisory liability.

It's liability for supervisors, but it's not supervisory liability in the sense that they would be liable because of gross negligence.

They also don't allege that the supervisors are individually liable for either the Fourth or the Fifth Amendment claims. The supervisors are only alleged to be liable for failing to support the fourth claim for supervisory liability.

So I think, to your Honor's point, we really do see them as essentially collapsed for purposes of this case based on the position that the plaintiff has taken in their

opposition brief.

THE COURT: All right. Thank you, Mr. Krause.

Ms. Gertner.

MS. GERTNER: Thank you. From your Honor's remarks, it's not clear to me that I need to address the question of statute of limitations, but I will for a moment.

It's hard to imagine any point in the time after the November 2010 search that it would have been appropriate to bring this case other than the time that it was brought. Your Honor's questions make that clear.

In November 2010, all Mr. Ganek knew is that there was a search warrant with his name on it expressly identifying his offices as among the offices of Level Global to be searched.

He doesn't see the affidavit. He immediately complains to the government about what's going on. The next thing that happens that is public is the arrest, some 14 months later, of individuals who are named.

So all he knows is that he was searched. He doesn't know the reason. He doesn't have the affidavit. Mr. Adondakis had been charged, but his materials were sealed.

Everything is sealed up until the moment of the arrest of Mr. Chiasson and Mr. Newman. At that point all he knows is that they were arrested, and he's not.

He moves to unseal the complaint, the affidavit rather. What he gets at that point is that there was an

informant out there who is saying that he did something wrong.

He doesn't know that the informant never said that he did something wrong. So, at that point, there's no basis on which to go to court.

So the only moment in which he could have gone to court is when he knew, very stunningly I might add, in facts that we never, ever see, that the informant never identified him. And the FBI agent, Mr. Makol, also underscored the fact that Adondakis never said Mr. Ganek.

It was at that point he knew he had a claim. If we set up rules with respect to statute of limitations requiring people to go into court when they're searched and they don't believe they should be, this Court would be flooded with claims like that.

If he should have brought the claim the minute he found out about an affidavit and disagreed with what the informant was saying in the affidavit, this Court would be flooded with claims.

The only moment he knew he had a claim was the moment that he knew that Adondakis had never implicated him, not in Dell, not in any insider trading whatsoever. So, if the standard is due diligence, it was clearly at that moment in this case is timely.

The government's claim that these allegations are implausible would make sense in any other case in which there

is not sworn testimony in open court by a government official saying, no. Adondakis never said this to me, and sworn testimony by Adondakis saying, no. I never implicated Ganek in any other way.

At one point in their papers, the government says why would the government leak to the media? Why would it not just characterize the affidavit as they did but, in addition, do this as a search warrant and in addition leak this? Why was the Fourth Amendment violated in the ways that we describe?

The government says why would it make sense for the government to leak to the media when what they were concerned about was the destruction of evidence?

I spent some time thinking about that argument. Why would the government leak the search to the media? What we've seen is a series of pleas of guilty since the insider trading investigations became public based essentially largely on pressure people felt because their name was sullied in the media.

So why would the government leak the search to the "Wall Street Journal"? Why is that remotely implausible? That's the way in which people came forward.

More than that, the government says why would we leak to the media. That's not a plausible allegation because it only leads to further destruction of evidence.

This case is about an affirmative misrepresentation,

the misrepresentation about Adondakis. But the next line in the affidavit which says a supervisor in a hedge fund told his employee to destroy evidence generally described is a material omission.

We will be able to show -- this is public documents -- that that concerned an entirely different hedge fund, your Honor, with respect to an entirely different man. Indeed that the person who was threatening to destroy the evidence was someone that the government had under surveillance.

There was never any danger of the destruction of evidence. So not only is the Adondakis statement contrived, but there's a material omission because the government had specific evidence to suggest that that really wasn't at risk in the Level Global case at all.

So why would the government release this to the press? The government released it to the press because there was no risk of any destruction of evidence, and there was ancillary advantages to releasing information to the press.

Why would they go forward with this knowing that Makol and Adondakis were going to testify to a statement? If the statements weren't made, why would they do that?

Well, they had to. Adondakis was going to take the stand. He was going to be testifying precisely about whether he had implicated any of these other individuals. He was going to be cross-examined. It was appropriate that they came

forward and said that.

Candidly, the government never believed that anyone would ever sue them over this. Is it implausible to believe -- and you're right. I want to start in a sense with the last discussion that you had with counsel.

The claims against higher-ups essentially in the office are claims of both supervisory liability and direct involvement.

It's very difficult to read the press concerning insider trading accusations and not believe -- and not understand that this was not a side prosecution.

This was a central prosecution, and, in fact, we made allegations of direct involvement, direct involvement in the debriefing of Adondakis, direct involvement in the search warrant, direct involvement in the decision to use the search warrant, and direct involvement in terms of the leak to "Wall Street Journal."

In addition, making supervisory accusations --

THE COURT: In view of Zurcher, how can it be said that the use of a search warrant instead of a subpoena would violate a clearly established ground?

MS. GERTNER: First of all, that's part of the misrepresentation claim here. The justification for exigent circumstances was itself a misrepresentation.

The notion here is that -- it's not that you can't use

a search warrant. That's certainly within the government's tool kit. The notion here is part and parcel of an intentional use of fabricated evidence in a search warrant affidavit, the use of a search warrant then to surface that and the tipping to the "Wall Street Journal."

It's not Zurcher. It's not just any old search warrant as a method of gathering evidence. It's the whole complex of the way this was done that essentially maximized the damage to Mr. Ganek.

So I think that the notion of implausibility is addressed by the facts that we have. This is not Iqbal and Twombly. We have the facts in this case, your Honor.

We have indeed many more facts than that because all of these insider trading investigations have been, for the most part -- not all. Most of them have been out as a result of the Chiasson immunity decision, and we know a great deal about the office.

So the allegations with respect to the Fourth Amendment --

THE COURT: Doesn't the government say that we have to look at the law as the government understood it at the time as opposed to the law as it's recently been held to be by the Second Circuit?

MS. GERTNER: The law as the government understood it, one hopes, is the law that you cannot lie in a search warrant

affidavit. The law, as the government understood it, is that you cannot contrive a public --

THE COURT: My point is just responding to your statement that most of these statements have now been nullied as a consequence of the Second Circuit's decision.

Why should I take that into consideration in this motion?

MS. GERTNER: I misspoke. What I meant was that the plausibility analysis -- the plausibility to some degree comes from the facts we already have.

We know there was a lie in this affidavit. We know it was a high-profile prosecution. We have these facts, and you have to take the facts in the complaint.

I was making a broader point, which is that -- in fact, perhaps it was inappropriate. We will know more about what was going on in the government's investigation in this case than most similarly situated plaintiffs know precisely because affidavits are being unsealed and information is being obtained. That's all that I was saying.

That will make it clear that the facts that we describe are not remotely implausible. I understand what you're saying. It's not the Chiasson and Newman case and the reversal that gives plausibility to what I'm doing. These facts stand on their own.

I think that there's no question again that we have

alleged enough for a Fourth Amendment violation with respect to the fabrication, the manner, and the leak.

The Fifth Amendment issues -- again --

THE COURT: Is your stigma plus claim dependent on the allegations regarding leaks to the "Wall Street Journal"?

MS. GERTNER: No. There is a search warrant that says that part of the places to be searched is -- one part is Ganek's private office. It's not just Level Global. It is Ganek's private office, papers, cell phone, etc.

Anyone reading that search warrant, which was a public document, would have understood that that is the functional equivalent of saying we believe something illegal is going on.

Let me contrast that with the Diamondback -- there were three search warrants that were executed the same day. Diamondback was another hedge fund where in fact they only had information as against a lesser individual, Todd Newman, and the search warrant affidavit does not implicate in any way the owner of the hedge fund. It was only with respect to Level Global that the search warrant did.

THE COURT: I noticed that in a footnote in your brief. It's sort of provocative. Is that pleaded in the complaint?

MS. GERTNER: No, it is not. No, it is not. That is outside the complaint. That's true. There's no way out of that statement. It is outside of the complaint.

THE COURT: All right.

MS. GERTNER: It is simply -- using it to show you that there was a way that they could have crafted the search warrant in a way that would not have had the consequences to Mr. Ganek that this search warrant did.

So it's not just "The Wall Street Journal" tip that was the problem. It is a search warrant that named Ganek's personal effects as being part of what was searched.

It's more than just the Sadallah case. It's more than just -- the case law is ripe with cases in which the government may have misspoken in a public statement and someone is harmed by it. But this is a search. This is a seizure. This is different.

THE COURT: How is it more than the Sadallah case? I guess I'm asking you to distinguish the plus prong there. In shorthand, why should a hedge fund be treated differently under the law than a restaurant and dance hall in Utica?

MS. GERTNER: There's a philosophical answer to that, but I won't get into it.

THE COURT: Give me the legal.

MS. GERTNER: It's because the nature of the government's act was different. In the Sadallah case, it was a statement. The government casted dispersions on the plaintiff indicating they were the subject of an investigation.

This is a situation in which it's more than that. If

the standard for plus is a materially altered situation as a result of government conduct, this is in the police search warrant seizure of his personal effects in a public document which the government executed.

We don't have many cases like this, your Honor, because it is so rare that people sue on this basis. But it seems to me the plus here is the government's action that is clear and unmistakable.

In addition, apart from stigma plus, there's a body of law that suggests the government simply cannot use fabricated evidence.

My colleague has reminded me of a Second Circuit case called Morse which was decided September 11, 2014. It's in our paper.

The dentist was accused of Medicaid fraud. He was acquitted in the course of the case. There were allegations and proof of false summary sheets, false summary sheets that were used as part of the fraud.

He's acquitted. He nevertheless sues under 1983 because of the false summary sheets. He wins a verdict, and the verdict was sustained by the Second Circuit.

So the notion is it is a substantive due process violation whenever the government lies, when the government fabricates evidence, when the government uses it in any situation.

That's very different -- uses it not in any situation, uses it in a formal situation, in a trial, in a search warrant affidavit. That's really very different than a press release about a dance hall.

THE COURT: The case law seems pretty clear that a court shouldn't analyze a substantive due process claim where the claim stands under the Fourth Amendment.

So I'd ask you to tell me why I should consider an argument to the contrary and what that argument is.

MS. GERTNER: That line of case law is concerned about essentially collapsing whatever restrictions we put on a Fourth Amendment.

In this situation, the substantive due process arguments are very different because it is whether or not there was probable cause in the rest of the search warrant, which I will get to in a minute, the fact of being named is what we are concerned about.

The fact of being named, not just once, not just incidental, not just minor but seven times in the search warrant affidavit is part of the litany of what was rotten about Level Global. That's what we're concerned about. It was the fact of being named, and that was the act that had consequences.

In that situation, it is much more analogous to the false summary sheets in Morse. It's much more analogous to a

case out of Massachusetts called Limone where the government lied in its papers to the Court.

This is an independent Fifth Amendment argument about which candidly courts should be concerned because it is lying to officers of the court. That seems to me to be a very different issue.

If I could roll back just to an argument that I missed which is that the notion that there would have been probable cause here, going back now to the Fourth Amendment argument, that there would have been probable cause if we excised Mr. Ganek's name from the affidavit.

The Court's questioning was exactly right. It wasn't just because of excising Mr. Ganek's name. The government had information that he was not Ganek. That ought to have been in the search of Level Global. There was not sufficient probable cause with respect to the rest of this leak.

Wiretaps -- the description of the wiretaps implicated others in the office, not Mr. Ganek. The allegation about destruction of evidence in other hedge funds didn't implicate Mr. Ganek.

Even if he was, as the government described, an unwitting participant in an insider trading ring, it would not have justified the search of his office and personal effects. That would have made a difference.

It was the personalness of this search warrant

affidavit, naming him, seeking his cell phone, his address book, the contents of his office that was the issue. That search warrant would have looked different if that had been taken out of it.

So I think that the search would have been different under these circumstances. As the Court rightly noted, whether or not the search would have been -- whether or not the magistrate would have granted a warrant without the Ganek information is a question of fact which we are entitled to try.

There's a Supreme Court case -- Lewis is the case -- that suggests it is a question of fact, not a question of law. I think it's a question of fact in our favor.

Just to recap, the statute of limitations we sued the moment we could. With respect to the Fourth Amendment allegations, we have alleged both knowing fabrication and either direct knowledge of people up the line or at the very least, supervisory liability. We've alleged the improper manner of the execution of the search warrant. We've alleged the tipping to the "Wall Street Journal."

Given the incredible press surrounding this investigation and all these investigations, it is -- I want to reverse the Iqbal Twombly comment. It would be implausible to believe that everyone in the office did not know about this, that everyone in the office was not intimately involved in this.

So I think we have met the Fourth Amendment standard, and we have met the Fifth Amendment standard.

THE COURT: On your failure to intercede claim, who specifically should have interceded and when should they have interceded?

MS. GERTNER: You can characterize that as a failure to intercede or contradicting a false statement in an affidavit. We have in fact gone back-and-forth on that.

If there had been a correction -- the complaint alleges that Mr. Ganek went to the U.S. Attorney's Office as soon as possible after the search was executed.

If there had been, for example, a statement that said that there was a mistake in the affidavit, that Ganek should not have been mentioned and that, if in fact, that nothing should have been taken from his office, that's all they had to do.

I would characterize this as a failure to intercede which makes it an unusual kind of case because the government doesn't exonerate when there aren't charges brought, but the notion that they had a duty to correct a misstatement on an affidavit seems to me to is both to the benefit of the Court and to the citizens who were mistakenly named.

THE COURT: Is it your argument that the U.S. attorney was constitutionally obligated to make an exonerating statement to the press about Mr. Ganek?

MS. GERTNER: Well, again, he was constitutionally obligated not to permit a lie in the initial search warrant. And then, when the lie was brought to his attention, which I believe was immediately -- I believe we indicate in our complaint that Mr. Adondakis was interviewed again after Level Global had failed.

So we're not talking about a year from the execution of the warrant. We're talking about a very short time after the execution of the warrant.

If there had been a correction that there was a mistake in the warrant, that's all. Failure to intercede I understand creates a broader constitutional responsibility, but the failure to correct a misstatement in the search warrant would have had salutary consequences for Mr. Ganek and would have made a difference.

THE COURT: As far as the supervisory defendants are concerned, is there any meaningful difference -- I'm putting the same question to you that I asked of Mr. Krause.

Is there any real difference between supervisory liability and the failure to intercede?

MS. GERTNER: There's a timing question. The question is what their responsibility was for the lie in the first instance.

We're saying, given the allegations in the complaint that given the nature of this investigation, we believe that

this was not the act of a low-level assistant and a low-level FBI agent.

The supervisory issues are at the moment of the lie, the fabrication, as well as the failure to correct the fabrication. I think it's in both places.

One doesn't need a broad concept of failure to intercede to say that the supervisors of the drafters of this affidavit and everyone who knew about it ought to have corrected it, either at the moment before the search or shortly thereafter.

In other words, I don't think that I'm broadening this area of the law, and I can well understand that that's not appropriate. I can well understand the policy reasons for not wanting to do that. But we're not talking about that.

We're talking about the responsibility of the higher-ups for that fabrication, and the responsibility of the higher-ups for not contradicting it when it should have been apparent to them, and we believe it actually was apparent that Mr. Ganek was not named.

The set of fact is really quite unique. If we lack cases that are exactly on point, it's because one rarely has a situation where there's sworn testimony at trial saying X and sworn testimony in an affidavit saying not X, and an individual willing to sue.

So we're drawing from analogies from the case law, but

we think it's entirely appropriate.

THE COURT: All right.

MS. GERTNER: Thank you.

THE COURT: Thank you, Ms. Gertner.

Mr. Krause.

MR. KRAUSE: Thank you, your Honor.

Your Honor, a number -- there are a number of responses. I'll try to organize them as best as I can. I might jump around a little bit.

On the point about the Fifth Amendment, counsel suggested that Morse indicates that there's a substantive due process violation here. That's not what Morse stands for. The fabrication at issue in Morse was something before a grand jury.

All of the cases that plaintiff cites involve deprivations of liberty. All of the case law specifically refers to the right having been identified as a right not to be deprived of liberty based on fabrication of evidence by a government employee. That's Zahrey. That's Morse.

In the circuit, the circuit in Morse in the footnote noted that there are different strains of cases, some of which locate that right in the Fifth Amendment, the right not to be deprived of liberty without due process.

Some located that right within the Sixth Amendment right to a fair trial. A.Q.C., which is one of the cases cited

by plaintiff in their brief, refers to the right to a fair trial.

But the circuit has developed a standard, a five-part standard for the right to a fair trial claim, the fifth element of which is to not be deprived of liberty. Again, I think there's a significant difference. There's no liberty claim here.

Another reason why there are no cases like this in a search warrant context -- first of all search warrants don't typically involve -- I can't think of a case where a search warrant involved depravation of liberty, unless if someone was detained during the course of the execution of the warrant, which is not what we have here.

Also the corrected affidavit analysis is a sort of unique creature to deal with the possibility of a misstatement in a search warrant.

There's no comparable legal framework for potentially finding qualified immunity even in the event of a misstatement in the search warrant. So we don't have that in the grand jury context or in the case where misstatements made by the government are made at trial.

So there's a very good reason why we don't see cases like that in a search warrant context, both because of the corrected affidavit analysis and because of the liberty consideration.

Towards the beginning of her comments, counsel mentioned something about Mr. Adondakis' testimony being that he never implicated Mr. Ganek at all. That's not his testimony.

The testimony that's cited in the complaint says, specifically when asked a question about whether he implicated Mr. Ganek, he says he doesn't know.

Then he's asked -- this is in paragraph 143 of the complaint. Then he's asked follow-up questions about Dell specifically. And then he testifies that he didn't tell Mr. Ganek the information about Dell specifically.

So that sort of circles back to our earlier point about the difference between a broader statement by Adondakis about securities generally and what he did testify to about Dell in particular.

As to the notion of the exigent circumstances -- that issue is addressed in the search warrant affidavit. It's not a requirement that the government demonstrate exigent circumstances in order to have probable cause to execute a search warrant.

In any event, in addition to the one application that counsel described, which is not pled with any specificity in the complaint as to this other hedge fund that she says there's information that's publicly available about.

The next paragraph talks about a particular individual

defendant identified in the search warrant, Mr. Kinnucan, who is also mentioned in the November 19 news article that's cited in the complaint as having sent an email out to all of his contacts saying that he had been visited by the FBI and that he believed he was the subject of a wiretap.

In the affidavit it also indicates that Mr. Kinnucan had contact with Mr. Chiasson at Level Global. So the exigent circumstances points are more complicated than the one paragraph, first of all. It does touch upon Level Global. In any I vent, it's not the relevant finding for a probable cause for the search.

The one point I believe I heard at least that a suggestion was that we could just excise Mr. Ganek's name from the search warrant affidavit, that that was the government's position.

That's actually not the government's position at all. We think what would be excised from the warrant would be much narrower because there are references to Mr. Ganek that in the complaint are not challenged, in particular, that Mr. Ganek received inside information from Mr. Adondakis and executed or caused others to execute trades based on that information.

We understand that the allegation in the complaint is that he did not know that the inside information was coming from a source inside the company and was breaching a fiduciary duty. But the alleged misstatement is that with respect to the

source, did Mr. Ganek know the source.

There's no allegation that the statement that he received, the information, was inaccurate or that he executed or caused others to execute trades based on that information was inaccurate or that Mr. Chiasson or the other Level Global employee whose name was redacted from the warrant also received the same inside information, did in fact know the source of that information, and also executed trades based on that information.

So we're not talking about a situation where Mr. Ganek is operating in isolation. All of this is alleged in the warrant. The fair probability standard of finding evidence of a crime is satisfied because of all the other elements that are described in the warrant affidavit.

The notion that a statement that his office was searched was a defamatory public statement. His office was searched. It does say that in the search warrant, but it was searched. That's a true statement.

THE COURT: What's the relevance to the reference in your motion that Ganek was returned to be an unindicted coconspirator during the Newman trial?

MR. KRAUSE: I'm sorry. What is the significance of that?

THE COURT: Yes. Why is that relevant?

MR. KRAUSE: We just ask that your Honor take judicial

notice of that ruling.

THE COURT: Why should I?

MR. KRAUSE: The complaint makes sweeping allegations of misconduct. It virtually alleges that the government engaged in a witch hunt against Mr. Ganek. That ruling is one example of how those allegations are misleading we submit and implausible.

The warrant obtained here was to search for evidence of a crime. Mr. Ganek received inside information and traded on decisions based on that information.

As a result of that information, from which the warrant was part of the initial stages of the information, two Level Global employees were convicted of insider trading.

THE COURT: Anything further?

MR. KRAUSE: No, your Honor.

THE COURT: Anything further?

MS. GERTNER: Can I just address the coconspirator issue?

THE COURT: Very briefly.

MS. GERTNER: The finding that was made by the Court was made as a result of information that was obtained after the search. So the notion that that finding could have buttressed information in the search warrant affidavit is simply not true.

As your Honor knows, Mr. Ganek's lawyer was not present during that discussion, and that is not a very

substantial threshold. That led to the introduction of two emails. There was an evidentiary ruling.

If the government is trying really at this late hour to suggest that that means there was more -- there's not just smoke but fire here, then that makes these accusations implausible. That would be extraordinary and unfair.

That finding was a very limited finding of evidence obtained after the search warrant, very low threshold, and without counsel. In addition, it should not be part of this Court's consideration of the face of the complaint under Roth v. Jennings. Thank you.

THE COURT: Thank you both for your arguments and your thoughtful briefs on this motion. I'll ask that you submit letters to me on the Turkmen issue let's say by December 7.

With respect to the motion, decision is reserved. Have a good weekend.

MS. GERTNER: Thank you.

MR. KRAUSE: Thank you, your Honor.

(Adjourned)